VIRGINIA LAW REGISTER.

VOL. VI.] NOVEMBER, 1900. [No. 7.

THE ESSENTIALS OF A VALID MARRIAGE IN VIRGINIA.

MARRIAGE IN GENERAL.

In pursuing our inquiry into the question as to what are the essentials of a valid marriage in Virginia, let us first ascertain what we are to understand by the term marriage.

Definition.—If we look to the older authorities we shall find it universally defined to be a contract; but for reasons which we may do well to omit for sake of brevity, it is evident that marriage partakes rather of the nature of status than of contract. So that we may well define it as "the civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may hereafter be, assigned by the law to matrimony." [1]

Origin.—The liberty of marriage is a natural right, inherent in mankind, confirmed and enforced by the Holy Scriptures; though it is not unworthy of remark that, comprehensive as were the manifold provisions made by the divine lawgiver of the Jews affecting almost every phase and transaction of human life, there is no ceremony prescribed for the celebration of marriage. The solemnization of marriage by a clergyman was a thing never heard of among primitive Christians, until, in consequence of its divine institution, Pope Innocent III ordered it to be solemnized; and it was not until the Council of Trent, in 1563, that the church attempted to exercise any controlling authority as to the manner in which it should be celebrated. By a decree

[1] 1 Bishop, Mar. Div. and Sep. 11. An eminent divine (Dwight) has described it as "the means of comfort to the married pair, the preservation and comfort of children, the source of all natural relations of mankind, and the gentle and useful natural affection; the source of all industry and economy; the ground of all education and knowledge, and of civility and sweetness; the origin of all subordination and government, and consequently of all peace and safety in the world; and, finally, the foundation of all religion, as it prevents promiscuous concubinage, and the children grow up and perform Christian duties."

from that council, the presence of the parish priest and two witnesses is made requisite to the validity of a marriage; but as the authority of that council never extended to England, we shall be but little concerned with it in our present discussion.

Regulations and Restrictions.—When it is considered that marriage is the most solemn engagement that one human being can contract with another, that it is the very basis of civilized society and of sound morals, the source of the domestic affections, and of the delicate ties and relations subsisting between parents and children, it is obvious that the public, as well as the parties themselves, are interested not only that such contracts should be made, but that, when made, they should be given the requisites of certainty and publicity.

Hence we find that the law-making bodies everywhere have prescribed certain solemnities of a public nature for the constitution of the contract, and for preserving the evidence of it—such as the issuance of a license, solemnization before some authorized person, return of the license, and the recordation thereof.

Having hastily seen what marriage is, its origin, and the incidents which attach to it, its relation to society, together with some of the regulations and restrictions imposed by legislatures, let us now look to the formation of the contract of marriage, which is the subject of this inquiry. Under this head may be considered the method in which the contract of marriage may be entered into—(I) *At common law* (II) *Under statutory regulations generally*, and (III) *Under the Virginia statute.*

I. MARRIAGE UNDER THE ORIGINAL COMMON LAW.

By the original common law, which antedates all statutes, and still governing save where altered by them, the mere *mutual present consent of competent parties*, in whatever form given, or in the absence of all forms, will constitute a marriage, valid in law as well as in fact.[1] We cannot become too strongly impressed with the truth that the sole source of the obligation of the marriage contract, as of all other contracts, is *consent*—the consent of competent parties—and not any statutory form or ceremony.

This consent is usually treated of as being given in three ways, viz., (A) Consent *per verba de presenti;* (B) Consent *per verba de futuro cum copula*, and (C) Consent implied from habit and repute. As to the last method, however, some courts deny its soundness, although it is

[1] *Dalrymple* v. *Dalrymple*, 2 Hag. Con. 54, 17 Eng. Rul. Cases, 11.

sustained by the decided weight of authority; and, indeed, we shall find that in England there is much controversy as to whether or not the presence of a person in holy orders is not also essential, in addition to consent.

(A) *Consent per verba de presenti.*—This term is applied to present mutual consent to become husband and wife at once, without the intervention of any period of time whatsoever. It is not necessary that it be immediately followed by cohabitation. An illustration of this form would be in any case in which a man and a woman, capable in law of contracting, announce their present consent to take each other as husband or wife. The announcements may be made consecutively,[1] contemporaneously,[2] or it may not be *per verba* at all, provided there be consent *de presenti*, howsoever communicated.[3]

(B) *Consent per verba de futuro cum copula.*—This phrase, if taken literally, is misleading, for it would imply that copulation, with an agreement to marry in the future, would constitute marriage, whereas the familiar maxim is *consensus, non concubitus, nuptias facit.* It is doubtless due to this obscurity that some of the American courts have held that this is not a form of consent such as is necessary to constitute a valid marriage.[4] The real meaning of the phrase, according to the weight of authority, is, that if parties who are under an agreement of future marriage have *copula*, being lawful only in the state of marriage, it will be presumed that they have converted their executory agreement into a present agreement of marriage, and in this form it differs but little, if at all, from the first form above mentioned. Construed in this light, it seems to be established by the great weight of American authority as a valid method of contracting marriage at common law, as administered in this country.[5] But it may doubtless be said, to speak more accurately, that this is rather sufficient *prima facie* evidence of a marriage, and is capable of being rebutted.[6]

(C) *Consent implied from habit and repute.*—In Scotland, and also in this country, if a man and woman live together in the relation of husband and wife, and so hold themselves out to the public, they will

[1] *State* v. *Walker* (Kan.) 13 Pac. 279.

[2] *Mathewson* v. *Phoenix Iron Foundry*, 20 Fed. 281.

[3] See *Teter* v. *Teter* (Ind.), 51 Am. Rep. 742; *Schuchart* v. *Schuchart* (Kan.), 60 Pac. 311 (1900).

[4] *Cheney* v. *Arnold* (N. Y.), 69 Am. Dec. 609; *Duncan* v. *Duncan*, 10 Ohio St. 181.

[5] Note to *Cheney* v. *Arnold*, 69 Am. Dec. 615, and cases there cited.

[6] 1 Bishop, Mar. Div. & Sep. 353-377.

be presumed to have given the requisite consent to establish a valid marriage. This rests upon the principle that the law will always presume morality and not immorality, marriage and not concubinage.[1]

Let it be remembered, though, that this is a mere presumption in the absence of evidence to the contrary, and is capable of being rebutted.

If it is shown that the relations of the parties were originally meretricious, it is held by all the courts that a marriage will not be presumed from their merely continuing to live together as husband and wife.[2]

II. COMMON LAW MARRIAGE IN ENGLAND.

There is much conflict of authority in England as to whether mutual, present consent of competent parties, without the superadded presence of a person in holy orders, will constitute a marriage, valid at common law. Prior to the reign of George IV, there was little occasion to agitate the question, for before that time a suit could be maintained in the ecclesiastical courts to compel a solemnization *in facie ecclesiae.*

Authorities are by no means scarce, sustaining both sides of the controversy, but to attempt a full discussion of them would require more time and space than are deemed expedient here, for it will be seen in the sequel that the American courts have adopted a common law of their own in this respect, and therefore a detailed exposition of the English law on the subject is not wholly indispensable to our present inquiry.

However that may be, to totally omit the English cases would render our discussion more or less incomplete.

Since the passage of Lord Hardwick's Act in 1753, repealed and substituted in 1823 by the Marriage Act of George IV, England has had positive statutes declaring all marriages, with certain exceptions, not celebrated according to prescribed forms, to be void; so that the cases from the courts of that country have generally arisen in some of its dependencies.

Until a comparatively recent time, Lord Stowell's masterly opinion in *Dalrymple* v. *Dalrymple,*[3] was generally understood as authoritative as to the common law on this subject.

[1] Bishop, Mar. Div. & Sep. secs. 378-381; *Gall* v. *Gall,* 114 N. Y. 109; *Teter* v. *Teter* (Ind.) 51 Am. Rep. 742; *Donnelly* v. *Donnelly,* 8 B. Monroe (Ky.) 113.

[2] *Ahlberg* v. *Ahlberg,* 24 N. Y. Supp. 919; *Crymble* v. *Crymble,* 50 Ill. App. 514; *Appeal of Reading, etc. Co.* (Pa.), 57 Am. Rep. 448; *Beverlin* v. *Beverlin* (W. Va.), 3 S. E. 36.

[3] 2 Hag. Con. 54, 4 Eng. Ecc. 485.

That was a suit for the restitution of conjugal rights, based upon evidence establishing an informal marriage in Scotland, by the mere consent of the parties, no celebrant being present. The court sustained the marriage, holding that the consent of competent parties was all that the common law required.

But in 1854, the case of *Reg.* v. *Millis*[1] came before the House of Lords, on appeal from Ireland.

The facts in that case were that Millis, a member of the Church of England, had married a woman in Ireland, who was either a member of the same church or a Dissenter, a Presbyterian minister officiating; and cohabitation followed. Subsequently, while this first wife was still living, the husband contracted a second marriage in England in the regular formal manner. He was indicted for polygamy.

The judges of Ireland differed, being about equally divided in opinion; though in form, that the case might be taken up, they united in giving judgment against the crown.

The House of Lords consulted the common-law judges, and these unanimously advised that the first marriage, not being celebrated by a minister of the established church, was invalid.

The Lords who gave judgment were equally divided, so that, according to the established rule, judgment was formally entered for the defendant, and the marriage in Ireland held to be invalid. Mr. Bishop justly criticises this case, and, for the reasons assigned by him, it has received scant following in America.[2]

Dr. Lushington, in a subsequent case, said that he was not disposed to carry the decision in that case one iota further than it went, for that it was only in consequence of the form in which it came before the House of Lords that it could be considered a judgment at all.[3]

[1] 10 Cl. & F. 534, 671.

[2] "We have here a question of almost pure ecclesiastical law, submitted to a tribunal of common-law and equity lawyers, who necessarily possessed little or no knowledge of the subject. So they asked advice, not from the ecclesiastical judges, whose functions had qualified them to give it, but from the uninstructed common-law judges. The latter were competent to learn, but they were not allowed the necessary time. Lord Chief Justice Tindal, who delivered their opinion, complained of the want of time for investigation; and the opinion throughout shows the complaint to have been well-founded. Thereupon the Law Lords, with this unintelligent advice before them, and not one of them being an ecclesiastical judge, or otherwise possessing any special knowledge of the subject, proceeded, not by a majority opinion, but by separate opinions equally divided, to overturn what that matchless ecclesiastical judge, Lord Stowell, had held on the amplest investigation, and what every other ecclesiastical judge, both before and since, has deemed to be the true law." 1 Bishop, Mar. Div. & Sep. 401.

[3] *Catterall* v. *Catterall*, 1 Rob. Ec. 580, 582.

The decision in *Reg.* v. *Millis,* though regarded as binding on the House of Lords and the inferior courts in England, has received no respect or support from abroad, having been repudiated even in the courts of Upper and Lower Canada.[1]

In a subsequent case which came before the House of Lords,[2] Lord Wensleydale, while agreeing that the decision in *Reg.* v. *Millis* was irrevocably binding on the House, took occasion to express the difficulty he had experienced in yielding to the opinion of the majority of his colleagues which had been delivered by the Lord Chief Justice in that case.[3]

The decision, then, in *Reg.* v. *Millis* may be regarded as of little importance, for it is scarcely too much to say that it was accidental; and it seems evident that the general professional opinion in England is opposed to it, and in favor of the rule laid down in *Dalrymple* v. *Dalrymple.*[4]

III. MARRIAGE IN AMERICA.

1. *Common Law Marriage.*—However it may be in England, it is too well settled for dispute in the United States, that to constitute a valid common-law marriage all that is necessary is that the parties should have the capacity and willingness to consent, and should actually consent to present marriage, and there is no necessity for the presence of a priest in orders, or any other celebrant.[5]

This doctrine is founded not only on substantially the entire weight of judicial authority, but on the soundest reasoning and good sense.[6]

It is interesting to note that just at the time when that august body, the English House of Lords, was divided on this subject in the case of *Reg.* v. *Millis,*[7] the Supreme Court of the United States was also equally divided on the same question,[8] and refused to express an opinion, the

[1] *Breakey* v. *Breakey,* 2 U. C. L. B. 349; *Conolly* v. *Woolrich,* 11 Lower Canada Jurist, 197, 224.

[2] *Beamish* v. *Beamish,* 9 H. L. Cas. 274.

[3] See Note, 17 Eng. Rul. Cas. 160-161.

[4] *Supra.*

[5] *Meister* v. *Moore,* 96 U. S. 76; *Hutchins* v. *Kimmel* (Mich.), 18 Am. St. Rep. 164; *State* v. *Zichfeld* (Nevada), 34 L. R. A. 784; *Clayton* v. *Wardell,* 4 N. Y. 230; 14 A. & E. Enc. Law, 514, and cases there cited.

[6] "Assuming (for the sake of argument) that the English common law did, when our country was settled, render impossible a marriage without a priest—was this impediment to matrimony adapted to our altered situation and circumstances? If it was not, and so not received by us, then we fall back on the law of nature; whereby, as already seen, marriage is constituted by the mutual present consent of two competent persons, without added formalities." 1 Bishop on Mar. Div. & Sep. sec. 418.

[7] *Supra.*

[8] *Jewell* v. *Jewell,* 1 How. 219.

case going off on another point. But the latter tribunal afterwards[1] emphatically recognized common-law marriages, as understood by the State courts generally. The doctrine is so well established in this country, save where altered by statute, that further discussion of this point is deemed unnecessary.

2. *Under Statutory Regulations Generally.*—As previously shown, the law-making bodies have everywhere prescribed certain statutory regulations and formalities supplementary to the common law, to give more certainty, and to furnish record evidence of the contract. These enactments are, in form, more or less mandatory; some of them entirely abolishing common-law marriages and prescribing requirements without which marriage cannot be contracted, as in Kentucky and the District of Columbia; others are more liberal, being merely directory, and enacted in the interest of the parties and the public at large, without subjecting the parties to the fearful consequences of a possible failure to comply with some minute detail of a mandatory statute; still others are couched in such doubtful terms as to admit of either construction, if we look merely to the language used.

The argument, briefly stated, in favor of construing these latter to be mandatory, is that public policy requires that publicity should be given to such contracts in order to guard against deceptions, and to provide permanent and accessible evidence of the relationship of parties living together; that thereby illicit intercourse is to a great extent prevented; that such mandatory provisions serve to aid parents in controlling the marriages of their wayward children; and, finally, they in a measure prevent wealthy and exalted young men from being bound by errors committed in their immature years, induced by premature love, or rakish passions.

This reasoning has been adopted by a few of the courts.[2]

But by the majority of the courts this reasoning has been repudiated, and it is held that when a man and woman, intending marriage, are living together in the relation of husband and wife, and hold themselves out to the public as such, public interests and the general welfare of society are better advanced by holding that they are in law, as well as in fact, husband and wife; that otherwise, in cases where parties intended no infraction of the law, their union would be declared mere-

[1] *Meister* v. *Moore*, 96 U. S. 76 (1877).

[2] *Commonwealth* v. *Munson*, 127 Mass. 459; *State* v. *Hodgkins* (Me.), 36 Am. Dec. 742 (dictum); *Re Estate of McLaughlin*, 4 Wash. 570, 16 L. R. A. 699; *Beverlin* v. *Beverlin*, (W. Va.) 3 S. E. 36 (dictum); *State* v. *Samuel*, 2 Dev. and Bat. (N. C.) 177; *Grisham* v. *State*, 2 Yerg. (Tenn.) 589.

tricious merely because of an unintentional failure to comply with some detail of no real importance; the result being that they themselves would be put to shame and mortification, their issue bastardized, property rights would be unsettled, and rights of inheritance, generally, would be disturbed.

(a) *Construction of statutes relating to marriage.*—Before we can intelligently enter upon the construction of one of these statutes, it is nesessary that we should first notice some general principles governing the construction of all statutes relating to marriage.

First. Marriage is a *common-law right* founded on the law of nature, and is *anterior to all human law.* It is, therefore, not subject to the general rule of construction that when a statute creates a right, parties must strictly conform to the legislative direction in exercising it. Furthermore, any required formal solemnization of marriage is to that extent an impediment to entering into it, and hence is to be strictly interpreted in favor of the marriage.[1]

Second. The law favors marriage. As Mr. Bishop says:[2]

"The institution of marriage, commencing with the race, and attending man in all perils, in all countries of his existence, has ever been considered the chief glory of the social system. It has shone forth in dark countries, and in dark periods of the world, a bright luminary on his horizon. And, but for this institution, all that is valuable, all that is virtuous, all that is desirable in human existence, would long since have faded away in the general retrograde of the race, and in the perilous darkness in which its joys and its hopes would have been wrecked together. Marriage, then, is to be cherished by the government as the first and choicest object of its regard. Therefore, every court, in considering questions not clearly settled or defined in the law, should lean towards this institution of marriage; holding, consequently, all persons to be married who, living in the way of husband and wife, may accordingly be presumed to have intended entering into the relation, unless the rule of law which is set up to prevent this conclusion is distinct and absolute, or some impediment of nature intervenes."

See also *Mathewson* v. *Phœnix Iron Foundry*, 20 Fed. 281; *Re Estate of McLaughlin* (Wash.), 16 L. L. R. A. 699.

Third. A legislative enactment to annul a marriage *de facto* is a penal enactment—penal to the parties, in that it declares their union meretricious, envelops them in shame and disgrace, resulting in social ostracism from polite society, and rendering them liable to an indictment for fornication; penal to the innocent offspring, in that it sends them out into the world as outcasts in society, branded with the

[1] *State* v. *Zichfeld* (Nev.), 34 L. R. A. 784: *Askew* v. *Dupree*, 30 Ga. 173.

[2] Bishop on Mar. & Div., par. 12.

stigma of illegitimacy—a stigma which the most virtuous life can never remove; and, finally, penal to society itself, in that it shocks public morality and decency with the spectacle of an unmarried man and woman living together in the relation of husband and wife, and jeopards the legal status of many a happy pair who are conscious of no violation of the law. Such enactments, therefore, being penal, are to be construed strictly.[1]

Fourth. The contract of marriage differs essentially from every other species of contract, whether of legislative or judicial determination, and this distinction is universally admitted. It is the basis of civilized society. Other contracts may be rescinded, and the parties restored to their former condition, but the marriage contract can never be undone, for even when it is judicially dissolved, the parties cannot be put *in statu quo.*

Fraud which will vitiate an executory contract *to marry,* differs widely from fraud which will vitiate an executed contract *of marriage.* To vitiate the former, comparatively slight cause may suffice; but for the latter, the law exacts grave cause, for in this case, to quote Mr. Bishop, "unborn children cry from the mother's womb, demanding that they may not be bastardized, lose a father, and know only a disgraced mother."

Settled Rule of Construction.—In consequence of the foregoing principles, it has come to be the settled rule, occurring in almost every decision dealing with the subject, *that a common-law marriage is valid, though not in conformity with the statutory requirement, unless the statute contains express words of nullity.*[2]

[1] *Askew* v. *Dupree,* 30 Ga. 173; *State* v. *Zichfeld* (Nev.), 34 L. R. A. 784.

[2] Mr. Justice Strong in *Meister* v. *Moore,* 96 U. S. 76, 79, expresses the idea as follows: "A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or clergyman, or that it be preceded by a license or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have generally held a marriage good at common law, to be good notwithstanding the statutes, unless they contain express words of nullity. . . . They speak of the celebration of its rite rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony." See also Reeves' Domestic Relations, 199, 200; 2 Kent's Com. 91. Mr. Greenleaf states the rule as deduced from decided cases as follows: "Though in most, if not all, the United States, there are statutes regulating the celebration of marriage, and inflicting penalties on all who disobey the regulations, yet it is generally considered that in the absence of any positive

EFFECT OF THE VIRGINIA STATUTE.

Reverting now to the subject of this discussion—"*The Essentials of a Valid Marriage in Virginia*"—it is to be borne in mind that unless the common law has been abrogated by statute, the former will govern, and a marriage based on mutual present consent of competent parties, given in one of the three ways mentioned in the earlier part of this paper, will be a valid marriage in Virginia, since the common law prevails here by express enactment.[1]

(A) FORMER LEGISLATION ON THE SUBJECT IN VIRGINIA.—In our investigation it will be found that a brief *résumé* (as brief as may seem to suffice for our purpose) of the statutory history of this subject in Virginia, will shed much light upon it, and aid us in our interpretation of the present statute.

The first statutory provision on record in Virginia relating to marriage, was that of 1631, 7 Chas. I, which prescribes that:

"Noe mynister shall celebrate matrimony betweene any persons without a facultie or lycense graunted by the Governor, except the baynes of matrimony have beene first published three severall Sundays or holy days in the time of devyne service in the parish churches where the sayd persons dwell according to the book of common prayer," etc., etc.; authorizing marriages to be celebrated "only betweene the howers of eight and twelve in the fore-noone"; and in case of minors requiring the consent of parents or guardians; and furthermore "all admynistringe . . . . of marriages shall be done in the church except in cases of necessitie."[2]

In this statute nothing is said as to avoiding marriages celebrated otherwise, nor as to inflicting punishment upon either the parties or the celebrant for failure to observe its provisions.

Subsequent statutes are:

Act of 1642–3, 18 Chas. I:

"That there be no marriage solemnized vnless by a lycense vnder the signett from the Governour, or the baynes lawfully published in the parish or parishes where both parties do inhabite."[3]

Act of 1646, 21 Chas. I:

"Be it now further inacted that what minister soever shall marry any persons

statute declaring that all marriages not celebrated in the prescribed manner shall be absolutely void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage regularly made according to the common law, without observing the statutory regulations, would still be a valid marriage."—2 Greenleaf's Ev. 531.

[1] Va. Code, sec. 2.

[2] 1 Henning's Statutes, 156, 158.

[3] 1 Henning's Statutes, 241.

contrary to the said act (*i. e.* of 1642) *shall ffforfeit the sume 1000 lb. tob'o.* to be disposed by the commissioners for the use of the county."[1]

Act of 1657—9th of Commonwealth:

"And the ministers only shall celebrate marriages and not without lycense as formerly, or theire publication of banes upon three severall dayes, *shall be fined tenne thousand pounds* of tobacco to ease the leavye of that county."[2]

The implication, from the first part of the last of these enactments, that a license is to be necessary, is not sustained by the remaining portion, which imposes a penalty for marrying persons otherwise than in accordance with its provions, but says nothing about avoiding the marriage.

The Act of 1661, 14 Chas. II, is of peculiar interest, in that it is the first, last, and only statute ever in force in Virginia, even for a day, containing direct words nullifying informal marriages. It provides:

"*That noe marriage be sollemnized nor reputed valid in law* but such as is made by the ministers according to the laws of Eng., and that noe ministers marry any persons without lycense from the Govenour or his deputy, or thrice publication of banes according to the prescription of the rubrick in the common prayer booke, etc., etc. And if any minister shall contrary to this act marry any persons, he shall be fined tenn thousand pounds of tobacco, *and any pretended marriage hereafter made by any other than a minister be reputed null, and the children borne out of such marriage of the parents be esteemed illegitimate, and the parents suffer such punishment as by the laws prohibiting ffornication ought to be inflicted.*"[3]

This is a harsh act, but no doubt, in spite of a slight inconsistency, would be held to invalidate any marriage not celebrated in conformity therewith.

If the Act of 1661 has proved interesting, that of 1696, 8 William III, will be found all the more interesting in this connection. The preamble recites that,

"Whereas many great and grievous mischiefes have arisen and daily doe arise by clandestine and secret marriages, to the utter ruin of many heirs and heiresses, and to the great grief of all their relations, *and whereas the lawes now in force for the prevention of such marriages do inflict too small a punishment for so heinous and great an offense,* Bee it enacted, etc."

Legislative rage seems now at its height, and we shall be interested to watch the outcome. The result is a repeal of the existing statutes on the subject, and the enactment of a fuller and more detailed one, viz:

[1] 1 Henning's Statutes, 332.

[2] 1 Henning's Statutes at Large, 433.

[3] 2 Henning's Statutes, 49.

"That noe minister or ministers shall from henceforth marry any person or persons together as man and wife without lawfull lycense, or without their publication of banns, according to the rubrick in the common prayer book. . . . And if any minister or ministers shall, contrary to this act, without such lycense or publication, marry any person or persons, he or they soe offending shall for every such offense *be imprisoned for one whole year without bayle or main-prize and shall forfeit and pay the sume of five thousand pounds current money*, one moytey thereof to our sovereign lord the king, . . . and the other moytey to him or them that shall sue or informe for the same . . ." (And a like punishment is imposed upon clerks who wrongfully issue license.)[1]

While thus imposing such severe penalties upon ministers and clerks for failing to observe its provisions, this statute imposes *no punishment upon the parties themselves;* and, what is especially noticeable, it carefully *omits the provision of the former statute declaring void, marriages not celebrated in conformity therewith.* Not only this, but it does not even contain the slightest implication to that effect. Nor in any subsequent statute, from colonial days to the present, does there appear any express clause of nullity, such as was contained in the Act of 1661.

Subsequent legislatures had the former acts before them, and had a definite object to accomplish, namely, to prevent informal marriages. This object they sought to attain by imposing severe penalties on the customary celebrants, and not by declaring the marriage itself to be void.

There are various subsequent statutes, all of practically the same import as the preceding, with penalties, varying in degree, imposed upon ministers and other officers for violating the provisions thereof. The question was certainly kept open, for new statutes occur every year or two.[2]

The Code of 1819 made no alteration of existing statutes, and the law as to contracting marriages remained thus until the adoption of the Code of 1849. The provision in that Code discards the negative terms previously used (i. e., "that *no* minister shall celebrate," or "*no* marriages shall be celebrated," etc.), and enacts in positive terms that "*Every* marriage in this State shall be under license," etc. But as this provision is the same as that found in the Code of 1887,[3] we shall discuss it in a different place. There is, however, a section in

[1] 3 Henning's Statutes, 149-151.

[2] The Act of 1792 provides that "No minister shall celebrate the rites of matrimony between any persons, or join together as man and wife, without lawful license, or thrice publication of banns," etc., but contains no clause affecting the validity of informal marriages. Statutes at Large, 230.

[3] Sec. 2222.

the Code of 1849 not found in any succeeding Code, which imposes a penalty of imprisonment for not more than one year and a fine not exceeding $500, upon any person who knowingly performs the ceremony of marriage between white persons without lawful license, but it imposes no penalty upon the parties themselves and contains no clause affecting the validity of the marriage for not complying with its provisions.

The provisions of the Code of 1860 and of 1873, respectively, are the same as are found in the Code of 1887.

(B) THE PRESENT VIRGINIA STATUTES.—We come now to look at our present statutes, and, although there are a number of provisions in reference to marriage in chapter 100 of the Code of 1887, the only one with which we are immediately concerned is that which enacts[1] that—

"Every marriage in this State shall be under a license, and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

Construction.—Upon a proper construction of this statute depends the solution of the question which is the subject of this paper. Whether the legislature meant to abrogate the common law, and to make the right to marry a statutory one, so that a strict and absolute compliance with its many details shall be necessary to the validity of the marriage; or whether, in the interest of the parties, and of society in general, the legislature meant only to *direct* that it be done in this way, as probably the best method of giving publicity and furnishing incontrovertible evidence of the marriage, are questions not without difficulty.

It will be noticed that the statute provides that "Every marriage in this State *shall* be under a license, and solemnized in the manner herein provided." This clause, if it related to anything else than marriage, would almost surely be considered peremptory; but in view of the principles already stated with respect to the construction of marriage statutes, it is generally conceded that if the statute stopped here, it would be construed to be directory only, and not mandatory. Upon this point there is practically no controversy.

[1] Sec. 2322.

Does this statute impliedly nullify common-law marriages?—It is the succeeding clause that creates the greatest doubt, namely:

"But no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person *if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.*"

In construing statutes there is a well-known guide expressed in the maxim, *expressio unius exclusio est alterius*—the mention of one thing is the exclusion of another. If we apply this rule to the statute in hand, the expression of an exception in case of an unauthorized person professing to be authorized, excludes from the list of exceptions any other ceremonial irregularity, and thus we make the statute mandatory, with the result that the only valid marriage is the statutory one.

But this maxim is by no means of universal application, and is of less potency in the law than the rule that statutes are to be interpreted according to their reason and spirit, and with due regard to their effects and consequences. These effects and consequences have already been considered.

History of the saving clause in the case of unauthorized celebrant.—But this particular clause may possibly be explained in another way. It has been seen that it was not contained in any of the colonial statutes of Virginia, and that it first finds its way into the Virginia statute in the year 1849. Massachusetts has this same clause in her marriage statute, incorporated into it in 1834. Michigan has had it since 1838; Wyoming since 1876; Maine since 1848; Colorado since 1854; West Virginia has doubtless had it since 1849, for, as she has it now, we presume that she retained it after her separation from Virginia. It is also found in the statutes of Indiana, Washington, Nebraska, Vermont, Georgia, and Oregon.

Another interesting fact is that the clause in question appears in the statutes of all of these States in the *same, or substantially the same, language*; and as Massachusetts appears to have been the first of the States to enact it, we shall look to that State for its origin and cause.

Chief Justice Gray, in *Commonwealth* v. *Munson*,[1] says:

"The object of this section as declared in the report of the commissioners who framed it, was to adopt the principle stated in *Milford* v. *Worcester*, 7 Mass. 43,

[1] 127 Mass. 459, 466.

that a marriage would be lawful if solemnized before a justice or minister, although without publication of the banns, and without the consent of the parents or guardians; *and to extend that principle* so as to prevent marriages from being invalidated on account of some defect, not known or suspected by either party, in the ordination of the minister or the commission of the justice in whose presence the marriage ceremony was performed."

And we would suggest that the commissioners were induced to extend the doctrine, as above shown, in consequence of the New Hampshire case of *Londonderry* v. *Chester*,[1] which was decided in 1820—fourteen years before the incorporation of this clause into the Massachusetts statute. In this case, the validity of a marriage was brought in question upon the sole point, as to whether a person who had once been ordained, though not at that time settled over any particular society, could be considered an ordained minister authorized to celebrate marriages. The court devotes some eleven pages to a discussion of what is proper ordination, etc., and from the number of times that we find this case cited, we presume it must have attracted much attention in legal and judicial circles.

This case doubtless brought to the minds of the Massachusetts commissioners this one instance, in which a marriage, contracted in good faith, might have been set aside for a pure technicality; and as the New Hampshire statute had been construed to be mandatory, it was deemed necessary to incorporate the exception in question.

This clause was afterwards incorporated into the statutes of a number of other States, following Masssachusetts, as shown. In at least seven of these States statutes containing this exception have been construed to be directory merely. The legislatures, in making this exception, evidently did not intend that it should be the only exception, but meant to provide for this special case merely out of abundant precaution. The State of Washington is the only State in which, by direct decision, it has been held that this clause *alone* abrogates the common law marriage; and the court in that case[2] seems to disregard the favor which the law has always accorded to the married state, and construes the statute as though it related to a matter of purely private interest.

AUTHORITIES.—But before coming to a conclusion as to what the object of the Virginia legislature was, in adding this clause to our statute, let us see how the courts have construed this and similar marriage statutes.

[1] 9 Am. Dec. 61.

[2] *Re Estate of McLaughlin*, 16 L. R. A. 699.

(a) *In Virginia.*—Unfortunately for our discussion, the Virginia court has never had occasion to construe this statute. After a very close search we have been able to find a few *dicta* only, but these mere straws serve to show the direction of the current.[1]

(b) *West Virginia.*—The statute in West Virginia is identical with that in Virginia.

In *Beverlin* v. *Beverlin*,[2] it appeared that in 1861, Elizabeth Foster, her husband then living, began to cohabit with one Beverlin in the State of Pennsylvania. They subsequently removed to West Virginia, where they lived and held themselves out as husband and wife for over twenty years. It also appeared that the former husband, Edward Foster, lived until 1873, and that she thereafter continued to cohabit with Beverlin. Subsequently, she instituted suit against Beverlin for a divorce *a mensa* and for alimony. There was no evidence of any marriage, save the fact of cohabitation. It will be seen, even upon a casual notice, that these facts are not sufficient to base a common-law marriage upon; for no court has ever held that a marriage will be presumed from the mere continuance of a union, illicit and adulterous in its inception. But the court declared, in

[1] The case of *Francis* v. *Francis*, 31 Gratt. 283, arose in 1879, under the Act of 1866, to legalize marriages in fact, existing among the emancipated blacks; and although it was insisted that the sole object of that act was to legalize the marriages of those, who, being slaves, could not legally contract the marriage relation, the court held that it would also apply to blacks who were born free. As to the proof of the marriage, the court said:

"It is not necessary that parties shall have expressly agreed to live together as husband and wife. The agreement or understanding may be implied, as in other cases, from their conduct and declarations. In the present case there is no positive proof of an express agreement of the appellant and the appellee to occupy the relation to each other of husband and wife. But the circumstances tending to show an implied understanding of that sort are almost as satisfactory as the direct testimony of unimpeached witnesses to the fact."

In a recent case, *Eldred* v. *Eldred* (Va.), 24 S. E. 477 (1899), Judge Cardwell said:

"If parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and especially if they are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. . . But cohabitation and repute do not constitute marriage. They are only evidence tending to raise a presumption of marriage, and like any other presumption of fact, may be overcome by countervailing evidence. . . . Our marital laws are plain and simple, not difficult to understand by the humblest citizen; and, *except in cases where the proof is clear that the parties claiming to have entered into matrimonial union have in fact done so—that their cohabitation has been matrimonial, and not illicit—no presumption of a marriage arises.*"

The court deemed it unnecessary to consider the question whether or not a common-law marriage would be deemed valid in Virginia; for the evidence was insufficient to establish that relation, and on the contrary seemed to establish a case of illicit connection.

[2] (W. Va.) S. E. 36 (1887.)

what was purely a *dictum,* that the statute had abrogated the common-law marriage.[1]

The case was decided properly, but it was no place for a discussion of the validity of a common-law marriage. The plaintiff simply failed for lack of evidence.

(c) *Massachusetts.*—In this State, it may doubtless be said to be firmly established that a marriage, to be valid, must conform to the statutory requirements, and that a common-law marriage is not recognized. This can be partly explained on the ground that in the early colonial history of Massachusetts, so early as 1646, statutes were passed entirely abrogating common-law marriages, these statutes *containing express words of nullity*—"that no pereon whatsoever in this jurisdiction shall join any person together in marriage, but the magistrate," etc., etc., "*nor shall join themselves in marriage,* but before some magistrate," etc. And although these words of nullity were omitted in subsequent statutes, yet under them a line of decisions had sprung

[1] Said Snyder, J:

"We think our statute has wholly superseded the common law, and in effect if not in express terms renders invalid all attempted marriages contracted in this State which have not been solemnized in compliance with its provisions. . . . It seems to me, therefore, that when the terms of the statute are such that they cannot be made effective, to the extent of giving each and all of them some reasonable operation, without interpreting the statute as mandatory, then such interpretation should be given to it. The statute under consideration, in express words, declares that 'every marriage in this State shall be under a license, and be solemnized in the manner herein provided.' It is possible that these words standing alone should, under the general rule just stated, be interpreted as merely directory. But the statute does not stop here. It qualifies these words by provisions which would be wholly useless and unnecessary if it were intended and should be held that the preceding provisions are simply directory. It is declared that certain marriages shall not '*be deemed or adjudged void*' because the person solemnizing them did not in fact have authority to do so. It also declares that certain other marriages shall not '*be void*' because they were solemnized without a license. These exceptions or qualifying provisions seem to me to be equivalent to an express declaration that marriages had in this State, contrary to the commands of the statute, and not saved by the exceptions, shall be treated as void. It is apparent that the legislature must have interpreted the statute as making the excepted marriages null and void without the excepting clauses, for otherwise the exceptions would be useless, and would not have been made. The introduction of the exemptions is necessary, exclusive of all other independent, extrinsic exceptions. The maxim is clear, '*expressum facit cessare tacitum*'—affirmative specification excludes implication."

The court further said:

"I have been unable to find any case in which the courts of this State or of Virginia have ever held that a *common law marriage was valid.* This is certainly persuasive evidence that such marriages have never been regarded as valid in these States."

It might have said with equal certainty that it was impossible to find any case in either State holding a common law marriage *invalid;* so that it is not such a persuasive argument after all.

up from which the judges, administering the law in their puritanic strictness, were unwilling to depart.

The present Massachusetts statutes are substantially similar to those in Virginia. An extract is presented in the foot-note.[1]

The best considered case construing this statute is *Commonwealth* v. *Munson.*[2] The case was upon an indictment for lewd and lascivious cohabitation—the defense being that the parties were married. It appeared that the defendant, intending to marry Martha A. Eaton, caused notice thereof to be entered in the office of the city clerk, and obtained the certificate required by statute; that, at a public religious meeting held in a chapel in Worcester, at which about fifty persons were present, *but no magistrate or minister*, the defendant occupied the pulpit, gave out a text, talked awhile, read a passage of scripture, and then sat down; that Martha Eaton then came forward and read a passage of scripture; and that then both joined hands, and defendant said, "In the presence of God and of these witnesses, I now take this woman whom I hold by the right hand to be my lawful wedded wife, to love and to cherish, till the coming of our Lord Jesus Christ, or till death do us part;" that Martha thereupon said, "And I now take this man to be my lawful wedded husband, to love, reverence and obey him, until the Lord himself shall descend from heaven with a shout and the voice of the archangel and with a trump of God, or till death shall us sever;" that the two then bowed and offered prayer; that the ceremony was performed in good faith, they believing that such was a compliance with the statute; and that with such belief they cohabited until indicted. This was held insufficient to constitute a marriage.[3]

[To be continued.]

WARREN D. HARRIS.

University of Virginia.

[1] After several sections providing who shall solemnize marriage, in what manner, etc., it is enacted that—

"No marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed justice or minister, or on account of any omission or informality in the manner of entering the intention of marriage, or in the publication of banns; *Provided* that the marriage be in other respects lawful, and be consummated with a full belief, on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

[2] 127 Mass. 459, 34 Am. Rep. 411 (1879).

[3] Upon these facts the court said:

"Whether it is wise and expedient so to change the law of Massachusetts as to allow an act, which so deeply affects the relations and rights of the contracting par-

PREFERENCES, GUILTY AND INNOCENT.

The fundamental purpose of the Bankruptcy Act of 1898, from the standpoint of the creditor is, briefly, that equality in the distribution of the bankrupt's estate is equity, and that all creditors shall share *pro rata* in such distribution. To this fundamental principle some exceptions, in the practical administration of estates, necessarily would, and equitably should, occur, and are recognized by the Act. While the fund arising from the bankrupt's estate is in actual course of administration by the Trustee, absolute equality could, of course, have been secured by treating the adjudication of bankruptcy as the "dead line," and determining the status and amount of all claims as of that date. But it is obvious that all payments, transfers, conveyances and preferences made by the insolvent debtor shortly prior to bankruptcy, and which in all probability are the acts of bankruptcy that occasioned an appeal to the bankruptcy court, would thus be ignored, or rather their effect validated and rendered unimpeachable, and the letter of any act so framed would wholly destroy its spirit and purpose. It is, therefore, essential that some period be fixed, necessarily a more or less arbitrary one, within which all dealings and transactions of an insolvent, who is subsequently adjudged a

ties and their off-spring, to become binding in law by the mere private contract of the parties, without going before any one as a magistrate or minister, is a matter for legislative, and not for judicial consideration. In the case before us, it appearing from the indisputed facts that, in the ceremony performed by the defendant and the woman with whom he has since cohabited, no third person participated or was understood or expected to participate in any way, and no civil magistrate or minister of the gospel, nor any person believed to be such, was present, and neither party was a Friend or Quaker, it was rightly ruled in the Supreme Court that no lawful or valid marriage between the parties had taken place."

The court, through Gray, C. J., expressly bases the decision on "*the long course of legislation and of judicial opinion*" in that State.

The following cases are also directly in point, holding the same way: *Medway* v. *Needham*, 16 Mass. 157; *Commonwealth* v. *Spooner*, 1 Pick. 235; *Meyers* v. *Pope*, 110 Mass. 314; *Norcross* v. *Norcross*, 155 Mass. 425.

The only *decision* in Massachusetts to the contrary is *Parton* v. *Hervey*, 1 Gray 119, decided in 1854. In that case, the question being directly before the court upon the marriage of a person under the statutory age, Judge Bigelow said, in reference to these statutes:

"*They are intended as directory only* upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages, when the prescribed conditions and formalities have not been fulfilled. But in the absence of any provisions, declaring marriages, not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages, regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by the statute. 2 Kent Com. 90, 91; 2 Greenleaf Ev. 460."